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No. 85-1132

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ROSENTHAL & ROSENTHAL INC. and
BROADWAY 41ST STREET REALTY CORPORATION,
Petitioners,

—v.—

THE NEW YORK STATE URBAN DEVELOPMENT CORPORATION; THE TIMES SQUARE REDEVELOPMENT CORPORATION; WILLIAM J. STERN, as Chairman and President of both the Urban Development Corporation and the Times Square Redevelopment Corporation; THE CITY OF NEW YORK; EDWARD I. KOCH, as Mayor of the City of New York; PARK TOWER REALTY CORPORATION; and GEORGE E. KLEIN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondents argue that the lower courts "engaged in a full review of Petitioners' claims" and suggest that the courts' "finding of public use or purpose precludes further review of the specific inclusion of Petitioners' property in the condemnation." Br. in Opp. at 10, 15. But this case was dismissed below on the ground that the complaint failed to state a claim on which relief could be granted. With no evidence before them, the lower courts made no findings of fact that the taking of petitioners' property is necessary to achieve the asserted public purposes of respondents' Project. In dismissing petitioners' allegations, the lower courts joincd a number of commentators (now including Professor Richard Epstein, *see* p. 4, *infra*) in

interpreting *Hawaii Housing Authority v. Midkiff*, ____ U.S. ___, 104 S.Ct. 2321 (1984), as effectively foreclosing all judicial review of condemnation decisions, notwithstanding *Midkiff's* express reaffirmation that there is a continuing, if limited, role for the courts in adjudicating the constitutionality of takings. *See Midkiff*, 104 S.Ct. at 2329.

Respondents make much of the Project's ostensible purpose of "cleaning up" the block of 42nd Street between Broadway and Eighth Avenue. No one would deny that improving social and economic conditions on this block is a matter of legitimate public concern. But respondents, like the courts below, ignore petitioners' specific allegations that the taking of their property is neither for this purpose, nor rationally related to it. Complaint, ¶¶ 20, 23 (29a-30a). Instead, petitioners allege that their building is being condemned solely for the private benefit and profit of respondent Klein, the politically well-connected real estate developer who will construct the massive new office complex included in the Project. Complaint, ¶¶ 21, 22 (29a-30a). This Court in *Midkiff* reiterated that the Constitution "forbids even a compensated taking where executed for no reason other than to confer a private benefit on a particular party." 104 S.Ct. at 2331. Petitioners have alleged that this is precisely such a case.

Berman v. Parker, 342 U.S. 26 (1954), a case on which respondents heavily rely, does not sustain the dismissal of petitioners' allegations. *Berman* stands for the propositions, not in dispute here, that urban renewal, even when conducted through a private developer, is a valid public purpose for condemning land, and that an agency may condemn the occasional sound building found in the midst of a blighted slum to carry out a comprehensive redevelopment plan. Those holdings, however, are inapplicable to the allegations of petitioners' complaint. Petitioners contend, and sought an opportunity to prove below, that the taking of their building is not necessary to achieve the redevelopment of neighboring properties on 42nd Street, but rather that respondents' Project has been enlarged beyond the area of blight to condemn peti-

tioners' property *solely* to make the Project more profitable for its private developers. Nothing in *Berman* condones such a misuse of the condemnation power for private gain.

Contrary to respondents' arguments, *Berman* is similarly inapplicable to the second legal theory on which petitioners' complaint relied, that respondents had acted arbitrarily and capriciously in condemning petitioners' structurally sound building on the edge of the Project, while leaving in private hands dilapidated and rundown buildings in the middle of the blighted area of 42nd Street within the Project's boundaries. While *Berman* held that a condemning agency may condemn every building, sound or unsound, within a blighted area, that is not in fact what respondents have done here. Instead, they have chosen to determine on a site-by-site basis which buildings to condemn and which to spare. Nothing in *Berman* suggests that these decisions can be made arbitrarily and capriciously, or on the basis of political favoritism.

In addressing petitioners' allegations that their building is being condemned solely to raise revenue to subsidize improvements elsewhere in the Project area, as a substitute for the taxation power, respondents repeat their conclusory assertion that their Project is for the public purpose of renewing 42nd Street, and argue that this issue is not presented by the case at hand. Yet even if respondents are taken at their word that the predominant purpose of their Project is to improve 42nd Street, rather than to benefit private developers, the issue remains whether the taking of petitioners' building is "rationally related" to this purpose, as the Constitution requires. *See Midkiff*, 104 S.Ct. at 2329. Although this Court appears never to have addressed the issue, the New York courts have recognized that the power to condemn may not be used as an alternative to the power to tax. Pet. at 14-15. If it were constitutionally permissible to condemn real property, not because the property is physically necessary for the construction of a public improvement, but because the condemnor wants to build a revenue-producing facility to subsidize other governmental activities, the power of eminent domain would

be enormously expanded. Literally any property, regardless of its location, could be condemned on this theory. This issue is of sufficient importance to be addressed by the Court on the merits, especially in a case such as this that involves a proposed taking of great size and significance to the nation's largest city.

Finally, respondents fail to rebut petitioners' basic point that by dismissing their complaint on its face, the lower courts necessarily rejected *all* of the legal standards that had been applied to adjudicate the constitutionality of takings prior to *Midkiff*. Under the standard applied by the lower courts, the courts may simply accept a condemning agency's assertion that its project is for a valid public purpose, and individual property owners are precluded from litigating whether the taking of their property has any rational relationship to that asserted public purpose. In his new book, Professor Epstein points out that the formulation of the "public use" standard in *Midkiff* may lead the courts to substitute their own speculation as to whether a project is for a legitimate purpose for the evidence that would emerge at trial:

> At a minimum the public use requirement is a strict limitation upon the power of government to take private property. That meaning is hardly captured by the present rendition [in *Midkiff*] for the expression "conceivable public purpose" suggests that the court, in its search for a "rational basis" can supply a purpose the legislature itself missed.

Epstein, *Takings: Private Property and the Power of Eminent Domain*, (Harv. Univ. Press 1985), at 162. While Professor Epstein agrees with the commentators cited in the petition that *Midkiff* has precluded any meaningful judicial scrutiny of condemnations, he decries this result, stating with specific reference to *Midkiff* that "the public use limitation . . . deserve[s] more respectful treatment than it receives today." *Id.* at 181.

Perhaps respondents, the lower courts, and the commentators are correct in their view that *Midkiff* conclusively fore-

closed judicial review of eminent domain decisions. But that is not what *Midkiff* itself said. Regardless of how the Court rules on the merits, the questions of what judicial role the courts are to play in eminent domain cases, and what standards the lower courts should apply in adjudicating the constitutionality of takings, are important issues that should be considered here. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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